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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Colusa)**

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THE PEOPLE,	C062400
Plaintiff and Respondent,	(Super. Ct. No. CR50218)
v.	
TIMOTHY STUART MOORE,	
Defendant and Appellant.	

Defendant Timothy Stuart Moore entered a negotiated plea of guilty to continuous sexual abuse of his daughter, a child under the age of 14 (Pen. Code, § 288.5, subd. (a)--count I),<sup>1</sup> and committing a lewd act upon his other daughter, also a child under the age of 14 (§ 288, subd. (a)--count II). In exchange for his plea, the prosecution agreed to dismiss the remaining nine counts of sexual abuse and incest.

At sentencing, the trial court considered the content of the probation report and the recommendations made therein, including a recommended aggregate term of 24 years in state

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

prison. Defendant argued for the middle term, noting that he had no prior convictions, was remorseful, and admitted his crimes early on in the process. The trial court was not persuaded and sentenced defendant to an aggregate term of 22 years in state prison, comprised of the upper term of 16 years on count I, the principal count, and a full, consecutive term of six years, the middle term, on count II.

Defendant appeals his sentence. We shall affirm the judgment in part and reverse in part, as discussed below.

## **DISCUSSION**

### ***Count I***

Defendant contends that the upper term sentence imposed on count I contravenes the holdings of *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], and thus his Sixth Amendment rights. Defendant is mistaken.

Defendant was sentenced after the Legislature amended section 1170 to give the trial court broad discretion to impose the lower, middle, or upper term by simply stating its reasons for imposing the selected term. As amended, the upper term, not the middle term, is the statutory maximum that may be imposed without additional factfinding. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851.)

Here, the trial court imposed the upper term because “anyone in an offense such as this is particularly vulnerable or is vulnerable; but they become more so over a period of almost

two years when there is a continued reign of abuse. And, frankly, the threats that went with it made the minor even more vulnerable, and that's as to what would happen to [defendant] and the fact that the family would be ruined; [defendant's] predictions have come to fruition.

"And the victim had to worry about that every time it happened: 'I can't go and tell what's happening because I'm going to be responsible.' And that did make her particularly vulnerable.

"And [defense counsel], the crime did involve planning. Did not involve any particular sophistication, but it certainly did involve planning. . . . And [defendant] took advantage, frankly, of his position of trust that can exist, and he obviously abused that trust."

Imposing the upper term for these reasons was well within the trial court's discretion. Because the upper term is now the statutory maximum, the trial court did not violate defendant's Sixth Amendment rights when it sentenced him to the upper term.

Defendant further contends the trial court erroneously relied on the elements of the offense in choosing the upper term. We disagree. The prosecution need not prove the victim's vulnerability or that defendant abused a position of trust in order to convict him of continuous sexual abuse or committing a lewd act upon a child; nor is the prosecution required to prove defendant planned his abuse of the children. (§§ 288.5, subd. (a) & 288, subd. (a).)

Accordingly, we find no error in defendant's sentence on count I.

## ***Count II***

Relying on this court's decision in *People v. Goodliffe* (2009) 177 Cal.App.4th 723 (*Goodliffe*), defendant argues the trial court erred in sentencing him to a full, consecutive term on count II. We agree.

"Section 667.6, subdivision (c) authorizes a trial court to impose 'a full, separate, and consecutive term . . . for each violation of an offense specified in subdivision (e) *if the crimes involve the same victim on the same occasion.*' (Italics added.) Subdivision (c) further provides that '[a] term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense in subdivision (e).'<sup>2</sup> (*Goodliffe, supra*, 177 Cal.App.4th at p. 727, fns. omitted.)

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<sup>2</sup> Section 667.6, subdivision (c) states in its entirety: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison."

Subdivision (d), on the other hand, "mandates a trial court to impose '[a] full, separate, and consecutive term . . . for each violation of an offense specified in subdivision (e) *if the crimes involve separate victims or involve the same victim on separate occasions.*'" (*Goodliffe, supra*, 177 Cal.App.4th at p. 727, fn. 10.) Here, the trial court failed to indicate whether it was sentencing defendant under section 667.6, subdivision (c) or (d), but under either subdivision the sentence is unlawful.

Defendant was convicted of sexually abusing different children on different occasions. Thus, he is "not subject to subdivision (c)'s discretionary sentencing scheme . . . ." (*Goodliffe, supra*, 177 Cal.App.4th at p. 730.) Defendant also was convicted of only a single offense listed in subdivision (e) (i.e., continuous sexual abuse of a child in violation of § 288.5, subd. (a)).<sup>3</sup> Accordingly, he also is not subject to

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<sup>3</sup> Section 667.6, subdivision (e) specifies the following offenses:

"(1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261.

"(2) Spousal rape, in violation of paragraph (1), (4), or (5) of subdivision (a) of Section 262.

"(3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.

"(4) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286.

"(5) Lewd or lascivious act, in violation of subdivision (b) of Section 288.

"(6) Continuous sexual abuse of a child, in violation of Section 288.5.

subdivision (d)'s mandatory sentencing scheme. (*Goodliffe, supra*, 177 Cal.App.4th at p. 730.) As a result, the trial court erred in imposing a full, consecutive term on count II.

The People's contention that defendant is precluded from challenging his sentence because it is the result of a negotiated plea bargain is not well taken. As noted by defendant, the plea bargain did not include a stipulated term. In any event, the sentence is unlawful.

### **DISPOSITION**

The judgment is reversed insofar as it relates to defendant's sentence under section 667.6 on count II, and the matter is remanded for resentencing. The judgment is affirmed in all other respects.

\_\_\_\_\_, J.  
BUTZ

We concur:

\_\_\_\_\_, P. J.  
SCOTLAND

\_\_\_\_\_, J.  
HULL

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"(7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 288a.

"(8) Sexual penetration, in violation of subdivision (a) or (g) of Section 289.

"(9) As a present offense under subdivision (c) or (d), assault with intent to commit a specified sexual offense, in violation of Section 220.

"(10) As a prior conviction under subdivision (a) or (b), an offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision."